

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition for Declaratory Ruling that USA	)	WC Docket No. 05-276
Datanet Corp. Is Liable for Originating	)	
Interstate Access Charges When It Uses	)	
Feature Group A Dialing to Originate Long	)	
Distance Calls	)	

**REPLY COMMENTS OF AT&T INC.**

AT&T Inc. and its affiliates (collectively, AT&T) respectfully submit the following reply comments to briefly address two points regarding the comments filed by USA Datanet Corp. (Datanet) in response to the petition for declaratory ruling by Frontier Telephone of Rochester, Inc. (Frontier).<sup>1</sup>

First, despite being confronted with persuasive factual and legal claims by Frontier explaining why Datanet is liable for originating access charges, Datanet did not offer *any* substantive arguments in its own defense. Indeed, Datanet did not challenge Frontier's contentions that Datanet offers ordinary long distance service that originates over Frontier's local exchange switching facilities and terminates on the Public Switched Telephone Network. Nor did Datanet contest that the *IP-in-the-Middle Order* and the Commission's access charge rules,

---

<sup>1</sup> Petition of Frontier Telephone of Rochester, Inc. for Declaratory Ruling that USA Datanet Corp. Is Liable for Originating Interstate Access Charges When It Uses Feature Group A Dialing to Originate Long Distance Calls, WC Docket No. 05-276 (Nov. 22, 2005) (Frontier Petition). On November 18, 2005, SBC Communications Inc. closed on its merger with AT&T Corp. The resulting company is now known as AT&T Inc. Thus, in these comments "AT&T" refers to the merged company, including its ILEC operating subsidiaries, unless otherwise noted.

on their face, compel Datanet to pay access charges for these ordinary long distance calls.<sup>2</sup>

Datanet also chose not to address the fact that, under the Commission's constructive ordering doctrine, it is liable for originating access charges even though it did not "order" originating access service directly from Frontier's tariffs. Given Datanet's complete failure to provide any substantive response to these issues, the Commission can rightfully conclude that Datanet has conceded that Frontier is correct on the merits of its petition and Datanet does, in fact, owe originating access charges to Frontier and other similarly affected local exchange carriers.

Second, Datanet's only answer to Frontier's petition is procedural: Datanet argues that the Commission cannot as a matter of jurisdiction, and should not as a matter of process, address the merits of Frontier's petition. As Frontier and other parties have already demonstrated, however, these procedural arguments are entirely meritless.<sup>3</sup>

*Jurisdiction.* Datanet asserts that Frontier's petition amounts to a claim for "damages" because Frontier asked the Commission for a declaratory ruling that Datanet and any similarly situated IP-in-the-middle carrier "must pay Frontier its duly tariffed originating interstate access charges."<sup>4</sup> Since Frontier has already sued Datanet for damages in federal district court, Datanet argues that section 207 of the Act, which prohibits parties from pursuing parallel claims for damages in both federal district court and before the Commission, "precludes" the Commission from exercising jurisdiction over Frontier's petition.<sup>5</sup>

---

<sup>2</sup> See 47 C.F.R. § 69.5(b); *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 (released April 21, 2004) (*IP-in-the-Middle Order*).

<sup>3</sup> See Frontier Opposition to Motion to Dismiss (Dec. 12, 2005); AT&T Comments at 7 n.18; USTelecom Comments at 14-15.

<sup>4</sup> Datanet Comments at 5 (quoting Frontier Petition at 5).

<sup>5</sup> Datanet Comments at 4-8.

Datanet's argument is ridiculous. Frontier's petition is not styled as a complaint seeking an "award of damages" under sections 208 and 209 of the Act.<sup>6</sup> Rather, Frontier merely asks the Commission to issue a declaratory ruling that Datanet must pay access charges when it uses Feature Group A dialing to originate long distance calls, which would enable Frontier to go back to court and pursue its pending claim for damages.<sup>7</sup> Indeed, from a procedural standpoint, this is precisely the type of declaratory ruling that the Commission issued in the *IP-in-the-Middle Order*. In that *Order*, the Commission stated that "it is reasonable that AT&T pay the same interstate access charges as other interexchange carriers for the same termination of calls over the PSTN," but then required purportedly aggrieved local exchange carriers to pursue "claims for recovery of unpaid access charges in state or federal courts as appropriate."<sup>8</sup> Section 207 did not prevent the Commission from issuing the *IP-in-the-Middle Order* and, contrary to Datanet's facile argument, it most certainly does not preclude the Commission from issuing a similar ruling here.

*Process.* Datanet asserts that "there is no [primary jurisdiction] referral from the district court," and therefore the Commission need not address Frontier's petition.<sup>9</sup> Datanet's argument is both implausible and irrelevant. Contrary to Datanet's characterization of the district court's decision, the district court expressly stated that it "agrees that the doctrine of primary jurisdiction applies" to the litigation between Frontier and Datanet.<sup>10</sup> The court further decided "to stay the

---

<sup>6</sup> See 47 U.S.C. § 208 (authorizing parties to file complaints with the Commission); 47 U.S.C. § 209 (authorizing the Commission to make an "award of damages" in response to a complaint).

<sup>7</sup> As Datanet acknowledges, the district court retained jurisdiction over Frontier's complaint (Datanet Comments at 3), thus enabling Frontier to return to court promptly once this Commission has issued a declaratory ruling.

<sup>8</sup> *IP-in-the-Middle Order* ¶¶ 15, 23 n.93.

<sup>9</sup> Datanet Comments at 10.

<sup>10</sup> *Frontier Telephone of Rochester, Inc. v. USA Datanet Corp.*, 386 F.Supp.2d 144, 149 (W.D. NY 2005).

instant case until such time as the FCC resolves the issue of whether or not VoIP providers such as Datanet are liable for access charges.”<sup>11</sup> Thus, the court clearly expects -- and is waiting for -- this Commission to supply the expert guidance the court believes it needs to resolve the dispute between Frontier and Datanet.<sup>12</sup>

Moreover, regardless of whether the district court formally referred anything to the Commission, this Commission has broad authority to “issue a declaratory ruling terminating a controversy or removing uncertainty.”<sup>13</sup> While Datanet attempts to portray this matter as a “particular dispute” between itself and Frontier that does not warrant a Commission declaratory ruling of general applicability,<sup>14</sup> Datanet knows quite well that Frontier is not the only victim of its unlawful access evasion scheme. According to the New York State Telecommunications Association, at least six other local exchange carriers in New York have been victimized by Datanet’s illegal behavior.<sup>15</sup> Indeed, because Datanet’s access evasion scheme was purposefully designed to avoid detection,<sup>16</sup> there may be even more local exchange carriers that have been similarly victimized and, perhaps of greater concern, other IP-in-the-middle carriers engaged in the same covert unlawful behavior as Datanet. Thus, not only is a declaratory ruling appropriate

---

<sup>11</sup> *Id.* at 151.

<sup>12</sup> See *Access Telecommunications v. Southwestern Bell Telephone Co.*, 137 F.3d 605, 608 (8<sup>th</sup> Cir. 1998) (the most common reason courts apply the doctrine of primary jurisdiction “is to obtain the benefit of an agency’s expertise and experience.”).

<sup>13</sup> 47 C.F.R. § 1.2.

<sup>14</sup> Datanet Comments at 13.

<sup>15</sup> NYSTA Comments at 4-6.

<sup>16</sup> See AT&T Comments at 6-8.

in this matter, it is desperately needed to stop carriers like Datanet from making a mockery of the Commission's access charge rules.

Respectfully Submitted,

By: /s/ Jack Zinman

Jack Zinman  
Gary L. Phillips  
Paul K. Mancini

Attorneys for  
AT&T Inc.  
1401 Eye Street, NW  
Suite 400  
Washington, D.C. 20005  
(202) 326-8911 – phone  
(202) 408-8745 – facsimile

January 24, 2006